Supreme Court, U. S.
FILED
MAY 24 1977
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1243

UNITED STATES OF AMERICA,
Petitioner,

vs.

TONY M. SMITH AND NELLIE SMITH,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM OF TONY M. SMITH AND NELLIE SMITH

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The question presented is whether amounts paid to Tony Smith as reimbursement for his actual expense incurred for meals while on duty as a Mississippi Highway Safety Patrolman are excludable from gross income under Section 119 of the Internal Revenue Code of 1954 when he was required to eat such meals along the regular routes served so that he could be reached for immediate duty.

Respondents are a uniformed Mississippi Highway Safety Patrolman and his wife who is a party by virtue of filing a joint return. The patrolman during the year 1972

was reimbursed for money actually expended by him for meals purchased while on duty on the highways of the state. He was limited to a maximum of $5 per day (later $6 per day) regardless of the expenditure but did not collect the amount if he was not on duty. He was further limited to the actual amount he expended.

Smith was required to submit a monthly expense voucher certifying to the amounts expended for each on-duty meal as an actual expenditure. These vouchers were audited and paid as an expense check separate from his salary check.

The Respondent, Smith, was required by his employer to be and remain on the highways of Mississippi during his duty hours and to eat his meals while on duty in restaurants along his route. He was required to notify headquarters when and where he was eating so that he could be reached for any immediate duty.

The Commissioner of Internal Revenue on audit disallowed these expense reimbursements as exclusions from income and assessed further tax. Smith paid and sued for a refund.

The United States District Court for the Northern District of Mississippi held (App. A to Petition for Writ) that the reimbursements were excludable from income under Section 119 of the Code reasoning that the patrolman's business premises encompassed the highways and the roadside restaurants in which he was required to take his meals so as to be on immediate call for duty. The Court of Appeals for the Fifth Circuit affirmed (App. B to Petition for Writ) relying upon its earlier decision in an identical case involving the same expense reimbursements for another

Mississippi Highway Safety Patrolman in *United States* v. *Barrett*, 321 F.2d 911 (C.A. 5, 1963).

The position of the Commissioner of Internal Revenue that these expenses were not incurred on the "business premises" of Smith's employer raises a substantial issue for this Court in light of the decisions of various circuits in *United States* v. *Barrett*, 321 F.2d 911 (C.A. 5, 1963); *Commissioner* v. *Kowalski*, 544 F.2d 686 (C.A. 3, 1976); *United States* v. *Morelan*, 356 F.2d 199 (C.A. 8, 1966); and *United States* v. *Keeton*, 383 F.2d 429 (C.A. 10, 1967) which hold in accord with the present case; and *Wilson* v. *United States*, 412 F.2d 694 (C.A. 1, 1969) and *Koerner* v. *United States*, No. 76-1495 (C.A. 4, 1977) which hold contra. Respondents therefore do not oppose the granting of certiorari based upon the question presented in the petition.

Respectfully submitted,

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May, 1977